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An analysis of federal Head Contracting Authority (HCA) decisions regarding overrides of statutory stays of contract award and continued performance resulting from bid protests

Brooks, Robert A., Jr.

Monterey California Naval Postgraduate School



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# **NAVAL POSTGRADUATE SCHOOL**

## **Monterey, California**



## **THESIS**

**AN ANALYSIS OF FEDERAL HEAD CONTRACTING AUTHORITY  
(HCA) DECISIONS REGARDING OVERRIDES OF STATUTORY  
STAYS OF CONTRACT AWARD AND CONTINUED PERFORMANCE  
RESULTING FROM BID PROTESTS**

by

Robert A. Brooks, Jr.

December 2002

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**AN ANALYSIS OF FEDERAL HEAD CONTRACTING AUTHORITY (HCA) DECISIONS REGARDING  
OVERRIDES OF STATUTORY STAYS OF CONTRACT AWARD AND CONTINUED PERFORMANCE  
RESULTING FROM BID PROTESTS**

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Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF SCIENCE IN MANAGEMENT**

from the

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December 2002**

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## **ABSTRACT**

This research examines the Federal agency source selection process within Federal contracting agencies by conducting an analysis of Federal Head Contract Authority (HCA) decisions to override the required statutory stay of contract award and performance, in accordance with the Competition in Contracting Act (CICA) of 1984, resulting from bid protests. This thesis includes an analysis of the Government Accounting Office (GAO) Comptroller General of the United States findings and independent research data with respect to Federal agency decisions concerning suspension of contract award and continued performance resulting from pre-award and post-award bid protests. This research evaluates the effectiveness of the Federal agency source selection process via an analysis of HCA and GAO decisions concerning suspensions of contract awards as a result of pre-award bid protests within the previous seven fiscal years. This research also evaluates HCA and GAO justifications for continued contract performance despite post-award bid protests within the previous seven fiscal years. The objectives are to determine if Federal contracting agency decisions are justified because of the source selection process being executed as designed, and to determine if agency judgments to continue performance are supporting the best needs of the Government.



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## **I. INTRODUCTION**

### **A. AREA OF RESEARCH**

This research examines the Federal agency source selection process within Federal contracting agencies by conducting an analysis of Federal Head Contract Authority (HCA) decisions to override the required statutory stay of contract award and performance, in accordance with the Competition in Contracting Act (CICA) of 1984, resulting from bid protests. This thesis includes an analysis of the Government Accounting Office (GAO) Comptroller General of the United States findings and independent research data with respect to Federal agency decisions concerning suspension of contract award and continued performance resulting from pre-award and post-award bid protests.

### **B. THESIS OBJECTIVE**

This research evaluates the effectiveness of the Federal agency source selection process via an analysis of HCA and GAO decisions concerning suspensions of contract awards as a result of pre-award bid protests within the previous seven fiscal years. This research also evaluates HCA and GAO justifications for continued contract performance despite post-award bid protests within the previous seven fiscal years. The objectives are to determine if Federal contracting agency decisions are justified because the source selection process being executed as designed, and to determine if agency judgments to continue performance are supporting the best needs of the Government.

### **C. RESEARCH QUESTIONS**

#### **1. Primary Research Question**

Is GAO's general support for HCA (both DoD and Civilian) pre-award bid protest decisions on suspensions of contract awards indicative that the Federal source selection process is effective, and are agency post-award bid protest justifications for continued performance warranted?

#### **2. Secondary Questions**

- What is the intended purpose of Federal Government source selection criteria?
- What is the intended purpose of the Federal Government source selection process?

- Is the Federal Government source selection process working as intended?
- What constitutes a HCA determination, as a result of a bid protest, that urgency justifies continued performance?
- What constitutes a HCA determination, as a result of a bid protest, that performance is in the Government's best interest?

#### **D. SCOPE**

The scope of this thesis includes: (1) a review of the regulations and steps regarding the source selection process; (2) an examination of the regulations and steps of the bid protest process; (3) presentation and analysis of seven fiscal years of agency suspensions of awards and continued performance data; and (4) an analysis of agency justification for suspensions of awards and continued performance. The thesis concludes with relevant suggestions and recommendations to validate the intentions and application of CICA with respect to HCA impact on pre-award and post-award bid protests.

#### **E. METHODOLOGY**

The methodology used in this thesis research includes:

- A comprehensive literature search of Government reports, internet-based materials and library information resources such as Lexis-Nexis
- Telephone interviews by telephone and email with personnel at GAO, Federal procurement agencies, and professional acquisition and law organizations
- A documentation review of available via archives involving GAO decisions handed down over the previous seven fiscal years

#### **F. ORGANIZATION**

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#### **G. BENEFITS OF RESEARCH**

This thesis is designed to benefit the Department of Defense, by providing unique insight and feedback regarding the application and effectiveness of the source selection process, as well as agency justifications for continued performance, with respect to Federal procurement bid protests. This researcher's intention is to provide critical analysis of the source selection process that will facilitate a better understanding of process validity and possible improvement.

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## **II. BACKGROUND OF THE AWARD PROCESS**

### **A. PURPOSE OF THE COMPETITION IN CONTRACTING ACT (CICA) OF 1984**

The Competition in Contracting Act (CICA) of 1984, Title VII of Public Law 98-369, addresses several substantial aspects of the Federal Government procurement process. In particular, Subtitle A: Amendments to the Federal Property and Administrative Services Act of 1949 requires agencies to obtain full and open competition utilizing competitive procedures, circumstances permitting, whenever possible in procuring supplies and services. The law defines “competitive procedures” and provides situational guidance on soliciting full and open competition, source exclusions and restrictions, alternate sources of supply, other than full and open competition, proposal evaluation, and use of noncompetitive procedures. Furthermore, Subtitle D: Procurement Protest System establishes a Federal acquisition protest system and identifies the Comptroller General (Government Accounting Office) as the ruling authority on protests involving procurement law infractions. (P. L. 98-369, 1984)

This statutory foundation appears throughout various Federal procurement directives. The CICA is codified in several sections of Title 10, 31, 40, and 41 of the U.S. Code (USC) and is applicable to both Department of Defense (DoD) and civilian procurement activities. Numerous parts of the Federal Acquisition Regulation (FAR), codified at Title 48, Code of Federal Regulations (CFR), provide direction on Federal procurement policies and procedures on competitive sourcing and protests. Furthermore, defense, service, and agency-specific supplements to the FAR also address Federal acquisition competition and recourse issues. (Vacketta, 2002)

The CICA was put into practice to correct a major fault in the GAO protest review process. Prior to 1984, a GAO reviewed protest limited the amount of relief available to a successful protestor because the contract awardee was executing performance. As a result, Congress enacted an automatic stay of performance when a contract was under protest until a detailed review of the protest was conducted. An exception allows the HCA to override the automatic stay, based on specific circumstances involving pre-award or post-award contract actions. If the protest is filed

prior to contract award, the HCA may override the stay if performance by a particular contractor is urgent and compelling. (31 USC 3553 (c)(2)(A)) If the protest is filed after contract award, the HCA may override the stay if performance by a particular contractor is either 1) urgent and compelling, or 2) in the best interests of the Government. (31 USC 3553 (d)(3)(C)(i))

## **B. PURPOSE AND SCOPE OF THE SOURCE SELECTION PROCESS**

The Federal source selection process is designed to allow agencies to obtain the best value in acquisitions by implementing techniques to assess and determine the merits of solicited proposals with respect to established criteria. Evaluation factors are based on the source selection approach identified in the acquisition plan. Different types of acquisitions contain different selection factors, such as cost or price, technical ability, past performance, schedule, socio-economic factors, statutory requirements, and trade-off considerations. (FAR 15.3)

The HCA is responsible for source selection, with the contracting officer (CO), or other agency-designated party, serving as the source selection authority (SSA). The SSA is charged with establishing a source selection strategy prior to sending out solicitations. Additionally, an evaluation team is formed, with appropriate subject matter experts identified, based on the specific characteristics and strategy of the procurement. Furthermore, it is imperative that the SSA remains consistent in controlling all issues and exchanges associated with the acquisition, as well as exercise consideration for advisory boards and panels. (FAR 15.303)

After the solicitation phase, the agency evaluates all proposals deemed as responsive. Evaluations address all aspects of each proposal, focusing on qualifications and abilities in meeting the requirements stated in the solicitation. (FAR 15.305) During evaluation, it may be necessary for the agency to seek proposal clarifications and engage in communications to enhance comprehension and to assist in determining a competitive range. (FAR 15.306) If discussions occur, the contracting officer establishes a competitive range and enters into negotiations with offerors for proposal refinement or revision. During the negotiation phase, the competitive range tightens and proposals are revised until a final revision date is promulgated. Offerors who were either not in the competitive range or removed from the range through discussions, pre-award

notifications, and requested debriefings, are deemed unsuccessful in the procurement. Following final submissions, the source selection authority determines which offeror is selected for contract award. (FAR 15.308) Notification of the award to the successful offeror occurs via letter or issuing the contract. (FAR 15.504) Post-award notifications to unsuccessful offerors in the final competitive range are required, as are post-award debriefings if requested.

### **C. PURPOSE AND SCOPE OF THE BID PROTEST PROCESS**

Bid protests are made to one of four forums: (1) the awarding agency; (2) the Government Accounting Office; (3) the U.S. Court of Federal Claims; or (4) the U.S. district courts. (Free Advice, 2002) Policy on agency procurement protests is established by Executive Order 12979. (See Appendix A) An agency protest is a notification from an interested party to the agency protesting the contracting agency's solicitation (pre-award) or contract award (post-award). A legitimate protest filed directly to the GAO requires the protestor to provide a copy of the complete protest to the agency for review and response. (FAR 33.104 (a)(1)) The GAO will dismiss court protests unless the court of jurisdiction requests an advisory opinion. (4 CFR 21.11) Before an agency protest is filed, all interested parties must attempt to resolve conflicts using alternative dispute resolution techniques. (FAR 33.103 (c))

If a protest is filed, the contracting officer or designated official must perform a review of the protest and submit a report to GAO. (FAR 33.104 (a)(3)(i)) The protestor may request an independent review of the contracting officer's decision at a level above the contracting officer. (FAR 33.103 (d)(4)) A contract may not be awarded if the protest is filed prior to award, unless the agency determines with valid justification that the award is urgent and compelling. (31 USC 3553 (c) (2) (A)) If the contract has been awarded, a protest filed within ten days after award or within five days after the debrief date offered to the protestor, suspension of contract performance must occur unless the agency determines performance is urgent and compelling or in the best interest of the Government. (31 USC 3553 (d)(3)(C)(i))

If a protest is filed and the agency finds cause to continue with award or performance, the HCA must approve an override request, due to the automatic suspension required by CICA, to GAO with a supporting Determination and Finding (D&F)

justification. (See Appendix B) The D&F must contain a clear and concise analysis as to why the need for the supply or service is urgent, and a compelling reason as to why the agency awarded to a particular offeror. Furthermore, in post-award protests, the D&F can also contain justification as to why the agency found the award to be in the best interest of the Government. (See Appendix C) Some courts, however, do not consider this reason subject for review, and will leave the agency's decision intact, unless evidence of bad faith, fraud, or violation of law is suspected.

A protest filed directly with the GAO is reviewed and may be summarily decided, dismissed, or, if requested and found to be necessary, heard. (4 CFR 21.5, 21.7, 21.10) The GAO issues its recommendation regarding the protest to all parties. If the agency's decision to override a protest and continue with contract award or performance is supported, then the agency executes and administers the existing arrangement. Should the GAO sustain the protest, the agency is required to comply with one or more remedial recommendations. (4 CFR 21.8) The protestor has the option to request reconsideration on a valid basis for reversal or modification. (4 CFR 21.14)

#### **D. CHAPTER SUMMARY**

The Competition in Contracting Act (CICA) of 1984 was enacted to promote the use of full and open competition in the Federal procurement system. In doing so, the law requires that Government procurement agencies are fair and equitable in soliciting, selecting, and awarding procurement actions among a wide vendor base. Congress, in establishing guidance on the protest process, has provided offerors an avenue for recourse in an effort to encourage fair and reasonable competition within the acquisition process. The head of a Federal contracting agency, during a protest, is required to suspend award or stop contract performance in accordance with provisions set forth in the CICA unless a decision to override the stay is justified as a result of urgent and compelling circumstances or because of the Government's best interest. CICA mandates that the Comptroller General report annually on bid protest decisions involving Federal procurement agency noncompliance with GAO recommendations, as well as provide suspension of award and performance data with respect to overrides. (See Appendix D) Data gathered from these letters is analyzed to assess HCA decisions to override the

automatic stay requirement mandated by Congress. Furthermore, an analysis of the data will attempt to evaluate the validity of the Federal source selection process.

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### **III. GAO AND AGENCY METRICS**

#### **A. RESEARCH STRATEGY**

In order to perform an analysis of GAO and Federal agency bid protest decisions regarding 31 USC 3553, the research conducted was designed to establish metrics for comparison. Initially, this researcher attempted to collect all fiscal year 2000 and 2001 bid protest decisions contained in the GAO annual letters to Congress. Attempts were made to locate the 124 and 95 individual decisions used as data in the fiscal year 2000 and 2001 letters, respectively. This researcher contacted the GAO, specifically communicating with the help and reference desk via telephone and the internet, speaking with the Office of General Counsel, and conducted inquiries and searches throughout their web site. Additionally, research was conducted on numerous Federal and civilian acquisition and legal web sites, as well as public and private sector archives, printing offices, and publishing agencies. None of the resources were able to assist in producing the specific decisions cited as data in annual letter.

Under direction of the thesis advisor, this researcher conducted multiple queries on situational decisions meeting the criteria contained in 31 USC 3553. Utilizing Lexis-Nexis, this researcher entered restrictions, general terms, key phrases, and regulation numbers during the data base search. As a result, from October 01, 1994 (beginning of Fiscal Year 1995) to present, 483 decisions were retrieved and reviewed in which 83 decisions met agency stay of award or performance override profile parameters. Thus, the following data displays both the GAO metrics and this researcher's findings.

Prior to conducting the data base research, this researcher established two major protest categories, procedural and administrative, and source selection and evaluation, in order to analyze offeror reasoning behind protest submissions. Protests based on procedural and administrative issues included disputes regarding proposal preparation, conflicts of interest, statutory requirements and limitations, scope definition, discrepancies with documentation, and reconsiderations. Protests filed due to concerns over source selection and evaluation factors included disapproval of proposal reviews,

source selection evaluation board (SSEB) assessments, and source selection authority (SSA) determinations among proposals.

Examples of procedural and administrative:

- Failure to properly hold discussions with all offerors
- Agency improperly awarded requirement on a sole-source basis because a potential vendor was given an incorrect understanding of the agency's requirements
- Agency reopened discussions and requested proposal revisions from only one offeror in the competitive range
- Agency's system integration contractor creates an impermissible organizational conflict of interest
- Agency is required to delay award until it has completed testing of its product for inclusion on the qualified products list (QPL)
- Bid was not received in the office designated in the invitation for bids until after bid opening
- Exception to full and open competition to justify this sole-source acquisition
- Compliance of competitor's proposed product with the RFP specifications
- Agency's acceptance of competitor's certification that it is a small business
- Agency improperly allowed competitor to correct a mistake in its bid

Examples of source selection and evaluation:

- Agency erred in finding its proposal technically unacceptable
- Agency selection of a higher-priced offeror with a reasonably assessed low performance risk rating
- Offeror challenges the agency's evaluation of proposals and source selection
- Contracting agency improperly determined that protester's product failed to meet a mandatory technical evaluation criterion and rejected its proposal as technically unacceptable
- Agency improperly downgraded protester's past performance based merely on protester's history of contract claims, with no allegation that protester abused the claims process

## **B. GAO BID PROTEST TRENDS**

The following figure represents the GAO decisions, from the GAO statistics, on all bid protests for the previous five fiscal years. This metric displays the overwhelming

trend of the GAO to deny or dismiss protests. In the previous five years, the GAO has, on average, sustained only 4.49 percent of all 7510 protests brought before review. (Where in Federal Contracting?, 2002)

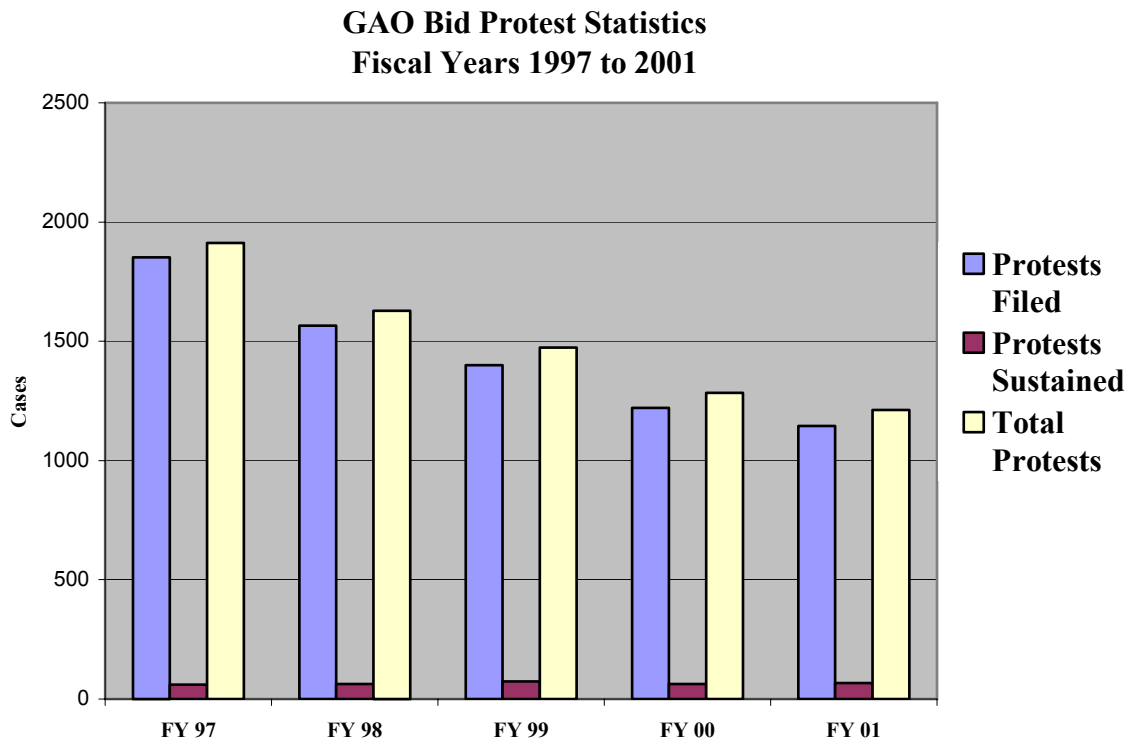


Figure 1. GAO Bid Protest Statistics, Fiscal Years 1997 to 2001.

The following figure represents the GAO decisions, from the GAO annual letters, on bid protests involving situations pursuant to 31 USC 3553 (d)(3)(c)(i)(I), agency override regarding contract award or performance due to the best interest of the Government, and 31 U.S.C. 3553 (d)(3)(c)(i)(II), agency override regarding contract award or performance resulting from an urgent and compelling nature, for the previous seven fiscal years. This metric displays a significant trend in the GAO agreement with HCA decisions. In the previous seven years, the GAO has, on average, sustained only 12.33 percent of the 764 protests brought before review. (See Appendix D)

**GAO Bid Protest Decisions FY 95-01**  
**GAO B-158766**

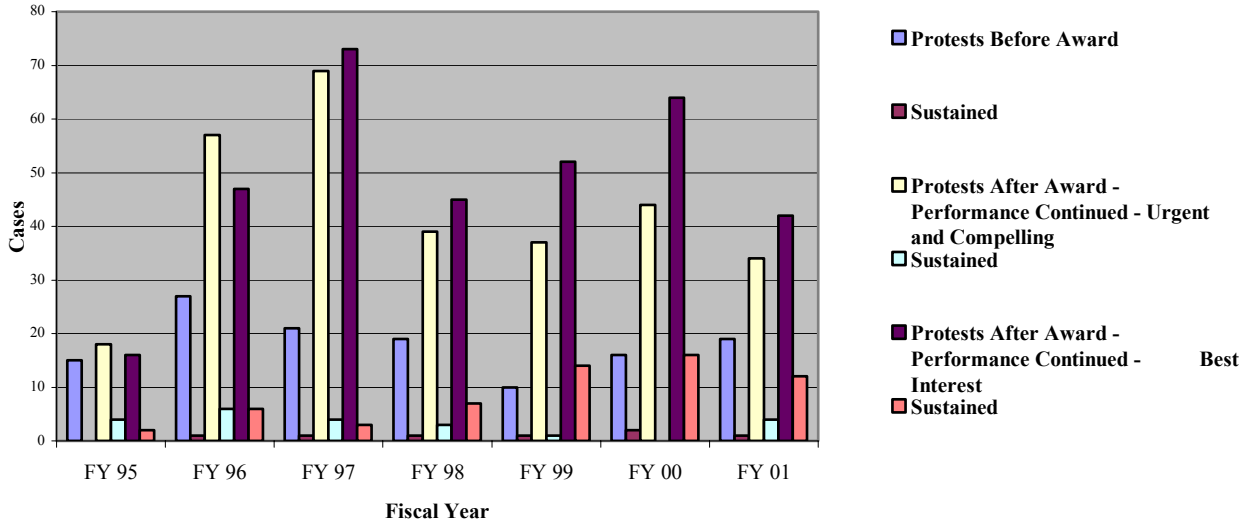


Figure 2. GAO Letter B-158766, Bid Protest Decisions, Fiscal Years 1995 to 2001.

**C. GAO BID PROTEST DECISIONS – CONTINUANCE OF AWARD**

The following figure represents the GAO decisions, from the GAO annual letters, on bid protests involving situations pursuant to 31 USC 3553 (c)(2)(A), agency override regarding the automatic stay of award, for the previous seven fiscal years. This metric displays a significant trend regarding the GAO's concurrence with HCA decisions. In the previous seven years, the GAO has, on average, sustained only 5.48 percent of the 134 protests brought before review. (See Appendix D)

**Protests Filed Before Award -  
Contract Awarded  
GAO B-158766**

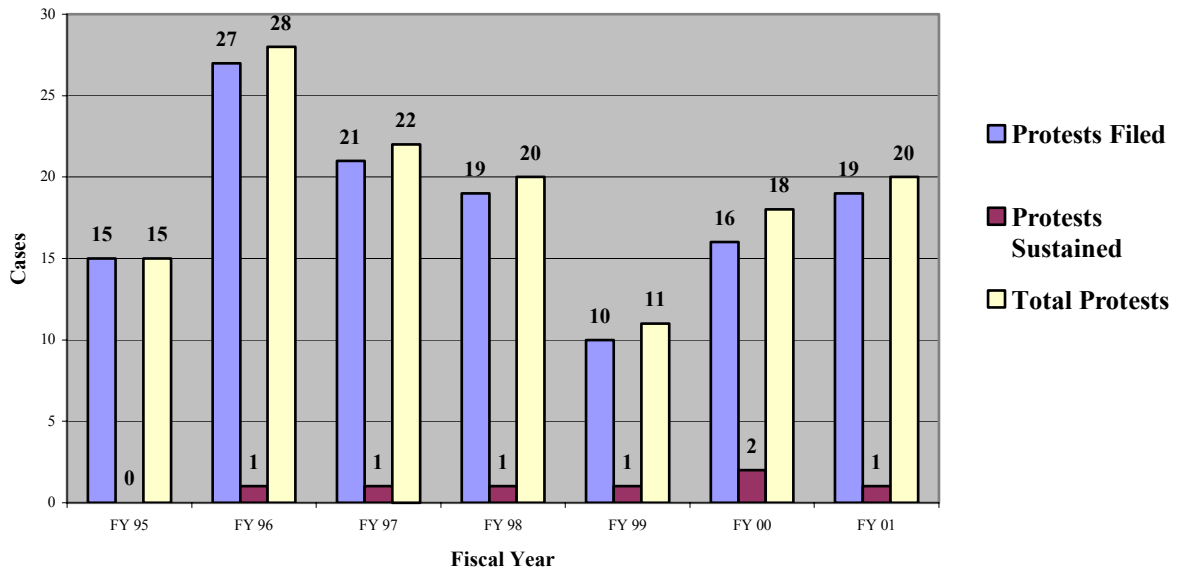


Figure 3. GAO Letter B-158766, Protests Filed Before Award – Contract Awarded.

The following figure represents the GAO decisions, from researcher data collection, on bid protests involving situations pursuant to 31 USC 3553 (c)(2)(A), agency override regarding the automatic stay of award, for the previous seven fiscal years. This metric displays a somewhat divided opinion between the GAO decisions and those of the HCA. Additionally, it appears that more pre-award protests pursuant to 31 USC 3553 (c)(2)(A) are due to offeror concerns regarding administrative or procedural considerations, as opposed to disapproval of agency source selection and evaluation procedures. In the previous seven years, the GAO has, on average, sustained 35 percent of the 20 protests brought before review, with a 33.33 percent sustain rate average for administrative or procedural issues and a 40 percent sustain rate average associated with source selection and evaluation procedures. (See Appendix E)

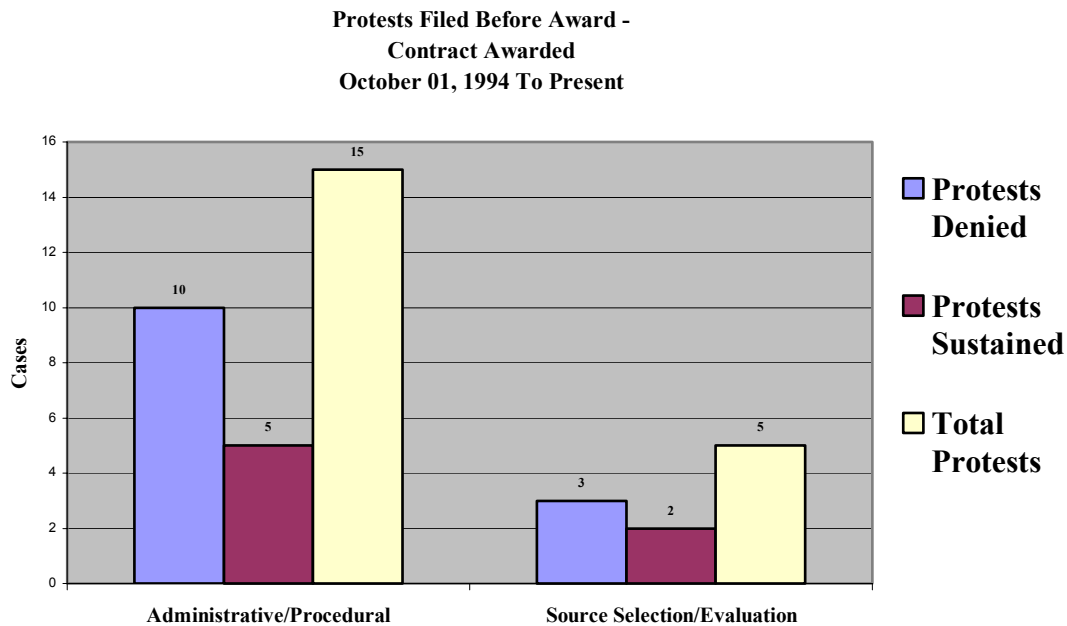


Figure 4. Protests Filed Before Award-Contract Awarded, October 01, 1994 to Present.

**D. GAO BID PROTEST DECISIONS – PERFORMANCE CONTINUED – BEST INTEREST**

The following figure represents the GAO decisions, from the GAO annual letters, on bid protests involving situations pursuant to 31 USC 3553 (d)(3)(C)(i)(I), agency override regarding the automatic stay of performance due to the best interests of the Government, for the previous seven fiscal years. This metric displays a significant trend regarding the GAO's concurrence with HCA decisions. In the previous seven years, the GAO has, on average, sustained only 14.75 percent of the 399 protests brought before review. (See Appendix D)

**Protests Filed After Award -  
Performance Continued Due To Best Interests Of The Government  
B-158766**

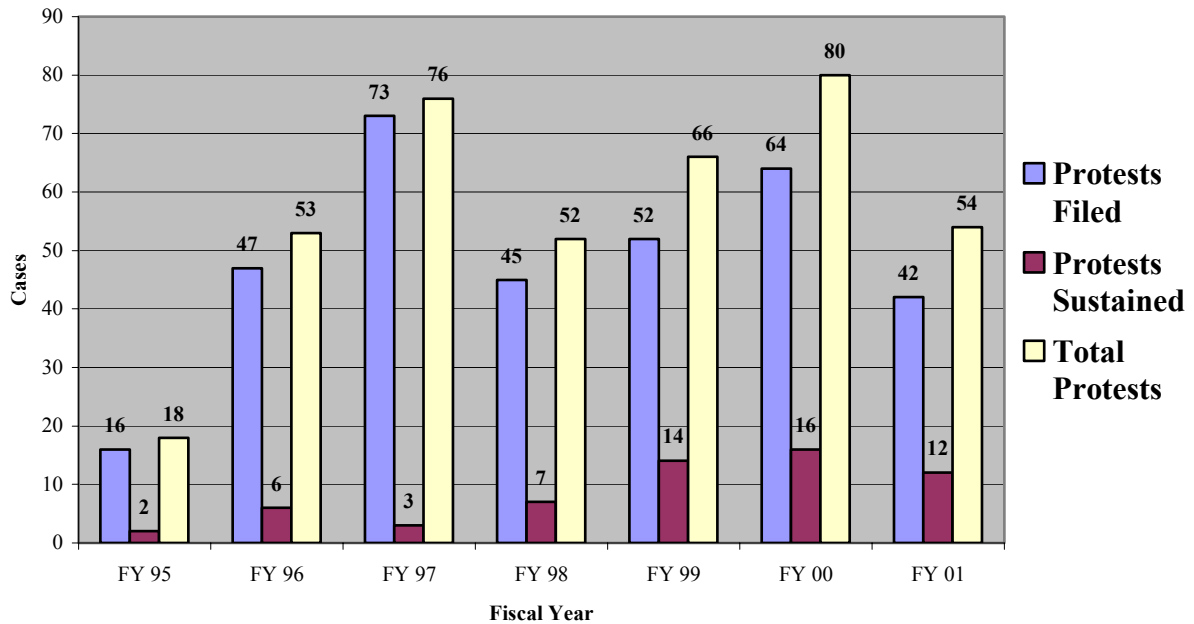


Figure 5. GAO Letter B-158766, Protests Filed After Award-Performance Continued Due to Best Interests of the Government.

The following figure represents the GAO decisions, from researcher data collection, on bid protests involving situations pursuant to 31 USC 3553 (d)(3)(C)(i)(I), agency override regarding the automatic stay of performance due to the best interest of the Government, for the previous seven fiscal years. This metric displays, again, more of a divided opinion between the GAO decisions and those of HCA. Additionally, it appears that more post-award protests pursuant to 31 USC 3553 (d)(3)(C)(i)(I) are due to offeror disapproval of agency source selection and evaluation procedures as opposed to concerns regarding administrative or procedural considerations. In the previous seven years, the GAO has, on average, sustained 53.33 percent of the 30 protests brought before review, with a 76.92 percent sustain rate average for administrative or procedural issues and a 35.29 percent sustain rate average associated with source selection and evaluation procedures. (See Appendix F)

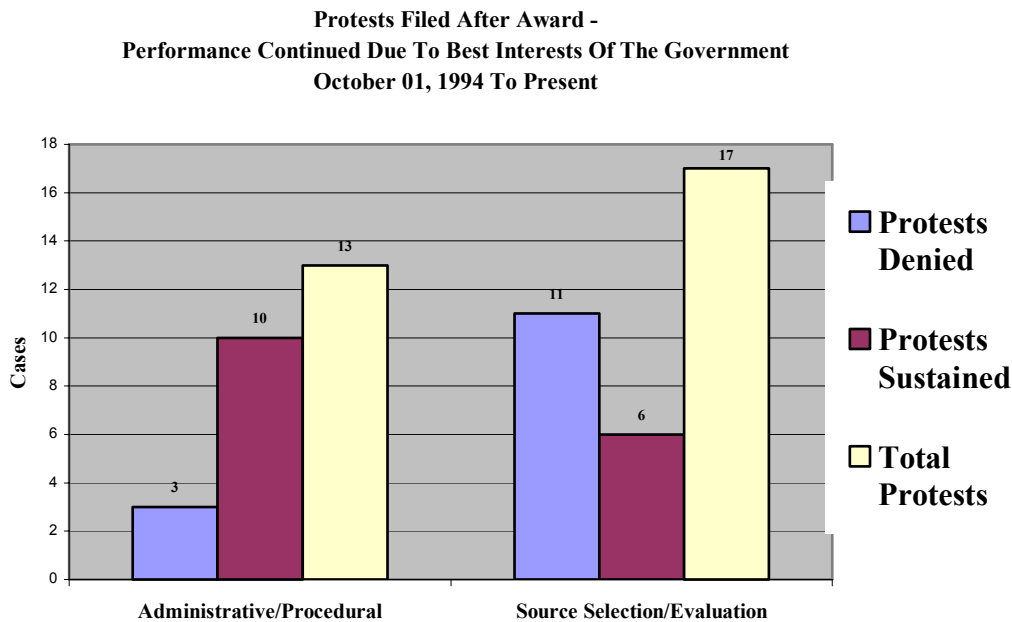


Figure 6. Protests Filed After Award-Performance Continued Due to Best Interests of the Government, October 01, 1994 to Present.

In accordance with 31 USC 3554 (b)(2), if the head of the procuring activity responsible for a contract makes a finding under section 3553 (d)(3)(C)(i)(I) of this title, the Comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, re-competing, or re-awarding the contract. In such cases where the protest was sustained, the GAO required the agency to pay for costs associated with protest filing, and either suspend the contract for re-evaluation or terminate the contract and re-compete or award (as stated), unless the protested contract was completed.

#### **E. GAO BID PROTEST DECISIONS – PERFORMANCE CONTINUED – URGENT AND COMPELLING**

The following figure represents the GAO decisions, from the GAO annual letters, on bid protests involving situations pursuant to 31 USC 3553 (d)(3)(C)(i)(II), agency override regarding the automatic stay of performance due to an urgent and compelling nature, for the previous seven fiscal years. This metric displays a significant trend regarding the GAO's concurrence with HCA decisions. In the previous seven years, the



GAO has, on average, sustained only 7.64 percent of the 320 protests brought before review. (See Appendix D)

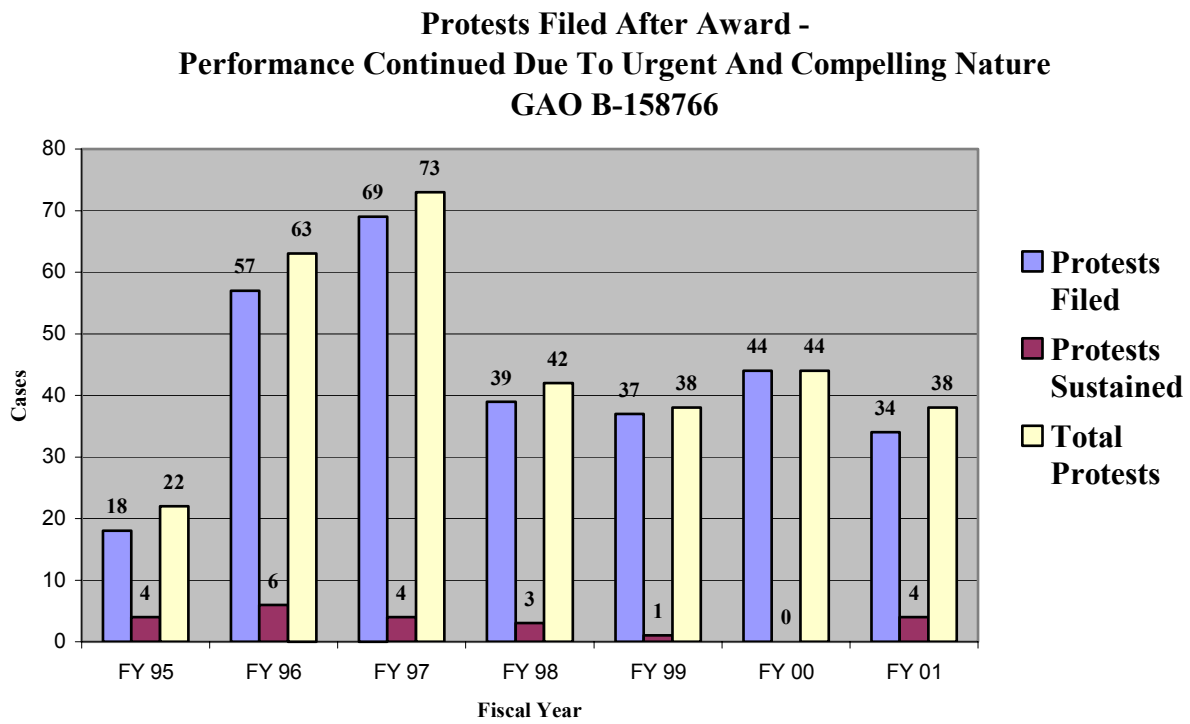


Figure 7. GAO Letter B-158766, Protests Filed After Award-Performance Continued Due to Urgent And Compelling Nature.

The following figure represents the GAO decisions, from researcher data collection, on bid protests involving situations pursuant to 31 USC 3553 (d)(3)(C)(i)(II), agency override regarding the automatic stay of performance due to an urgent and compelling nature, for the previous seven fiscal years. This metric displays a more divided opinion between the GAO decisions and those of the HCA. Additionally, it appears that more post-award protests pursuant to 31 USC 3553 (d)(3)(C)(i)(II), are due to offeror disapproval of agency source selection and evaluation procedures as opposed to concerns regarding administrative or procedural considerations. In the previous seven years, the GAO has, on average, sustained 39.4 percent of the 33 protests brought before review, with a 53.85 percent sustain rate average for administrative or procedural issues and a 30 percent sustain rate average associated with source selection and evaluation procedures. (See Appendix G)

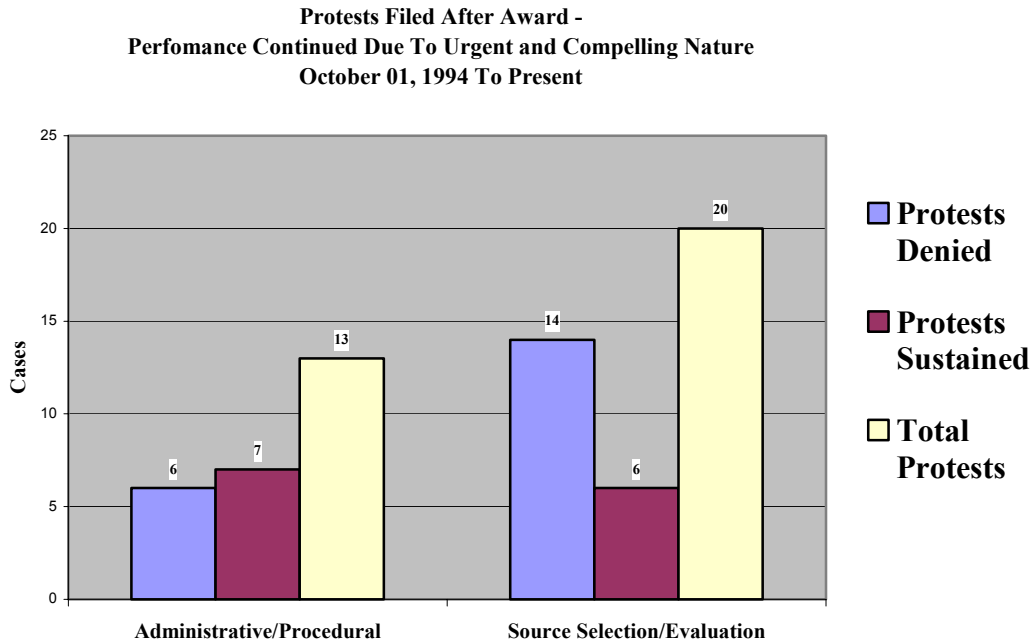


Figure 8. Protests Filed After Award-Performance Continued Due to Urgent and Compelling Nature, October 01, 1994 to Present.

In accordance with 31 USC 3554 (c) (1), if the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of -

- filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees
- bid and proposal preparation

In such cases where the protest was sustained, the GAO required the agency to pay for costs associated with protest filing. The GAO did not suspend contracts for re-evaluation or terminate the contracts and re-compete or award (as stated) because of timeliness associated with completing the existing contract.

## F. CHAPTER SUMMARY

The research conducted in this chapter is intended to provide metrics for the next chapter's analysis and comparison regarding Federal agency justification for overriding stays of contract award and suspended performance. According to GAO documentation,

data suggests that the Comptroller General overwhelmingly supports agency determinations in exercising the option of overriding the automatic stay. This researcher's independent study of GAO decisions, with respect to agency overrides, suggests that there is a balance between agency and offeror viewpoints. Furthermore, the independent data collection included categorical information associated with protest filing and the respective determinations. This information can be used to determine the validity of current procurement procedures and source selection and evaluation assessment.

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## **IV. ANALYSIS**

### **A. INTRODUCTION**

This chapter addresses HCA justifications for overriding contract award and performance statutory stays by interpreting the data in the previous chapter and conducting analysis on specific decisions found from the independent research. Both GAO and researcher metrics serve as foundations for interpretation and discussion. In supporting these interpretations, a detailed analysis of specific cases from the independent research, sustained decisions in particular, allows for a comprehensive understanding of the level of HCA credibility regarding override justification, procedural compliance, and source selection and evaluation performance. A detailed analysis of the denied decisions found in the independent research is not provided, as this researcher assumes, because of the inconsistent findings in the previous chapter, that if both GAO and HCA are in agreement, this suggests that agency credibility regarding override justification, procedural compliance, and source selection and evaluation performance is warranted. A general analysis of the denied decisions, however, is addressed in the chapter summary.

The following analysis assumes the independent research included an acceptable sample of GAO rulings on protests involving agency overrides of the statutory stay as required by CICA 1984. Although there is no reason to question the accuracy of the GAO metrics, as stated in the previous chapter, no references were found to support this data.

### **B. AGENCY JUSTIFICATIONS AND AWARD SUSPENSIONS**

In general, the GAO sustains very few bid protests brought before review (4.49 percent of 7510 protests in the previous five fiscal years). (See Figure 1) Furthermore, the GAO data shows a historically consistent trend in supporting HCA decisions to override required stays in contract award that result from pre-award bid protest (5.48 percent of the 134 protests filed in the previous seven fiscal years). (See Figures 2 and 3) These metrics suggest that HCA override actions are warranted.

Data gathered from the independent research, however, suggests that although the GAO supports HCA decisions in overriding automatic stays of award, there are significantly lower instances in which agreement occurs (35 percent of 20 protests filed in the previous seven fiscal years). (See Figure 4) It appears that protests based on administrative and procedural issues, as well as those concerning the source selection and evaluation process, had very similar sustain rates. This suggests that the majority of HCA override actions are warranted, regardless as to the reason for protest.

The following discussion addresses those sustained decisions in which the GAO and HCA were in disagreement as a result of *administrative and procedural issues*. In reviewing these decisions, this researcher includes analysis and recommendations to offer areas of consideration, with respect to administrative and procedural actions, to prevent future conflicting opinions from occurring.

In the case of Todd Pacific Shipyards Corporation, B-281383, February 1, 1999, 99-1 CPD P28, the GAO found that each bidder's additional proposed foreseeable costs for ship repair were grossly understated, thus the agency's solicitation to determine a low bidder was improper. The agency, by conducting thorough market research, cost estimation, cost realism analysis, and exchanges, could have captured a more accurate and realistic figure to use for determining the lowest acceptable bid in the solicitation.

In the matter of Navajo Nation Oil & Gas Company, B-261329, September 14, 1995, 95-2 CPD P133, the GAO determined that a solicitation clause containing specific experience requirements for jet and diesel fuel dealers unduly restricted competition from refiner/manufacturer offerors because there was no evidence that the restriction was necessary to meet the agency's minimum needs. The agency, engaging in requirement clarifications with the customer and conducting thorough market research, could have properly identified the required minimum need for the solicitation.

In the decision regarding Resource Applications, Inc., B-271079.6, August 12, 1996, 96-2 CPD P61, during an award under a small business set-aside procurement, the contracting activity failed to provide a pre-award notice to unsuccessful offerors as required because the Small Business Administration determined the size of the successful offeror to be other than small. Although the protest was sustained, the awardee was

allowed to continue because no other offeror was eligible and the agency had an urgent and compelling need.

In the case of General Distributors, Inc., B-257812, November 14, 1994, 94-2 CPD P184, the GAO found that the contracting officer failed to conduct the procurement under a small business set-aside, because it was determined that numerous small business bidders existed and that an expectation of acceptable fair market price from small business bids was reasonable. The contracting activities could have been more aware of small business considerations by obtaining current small business information through resources such as the Small Business Administration, and by conducting sound market research. This information could have enhanced the procuring activity's awareness of the small business environment as well as assisted the contracting officer in following the proper procedures regarding the respective procurement actions.

In the matter of Techno-Sciences, Inc., B-257686; B-257686.2, October 31, 1994, 94-2 CPD P164, the GAO found that the agency failed to exercise proper advance procurement planning when it improperly extended a contract on a sole-source basis when other responsible sources were available. The agency, maintaining requirement awareness through attentive contract administration and comprehensive market research, could have foreseen the upcoming requirement, planned accordingly, and determined if other potential offerors existed for solicitation.

The following discussion addresses those sustained decisions in which the GAO and HCA were in disagreement as a result of *source selection and evaluation issues*. In reviewing these decisions, this researcher includes analysis and recommendations to offer areas of consideration, with respect to source selection and evaluation actions, to prevent future conflicting opinions from occurring.

In the case of Telos Field Engineering, B-253492.6, December 15, 1994, 94-2 CPD P240, the GAO determined that the agency's technical evaluation of proposals, neither reasonable nor consistent with the solicitation, resulted in errors that affected the outcome of the competition. In the matter of Olympus Building Services, Inc., B-285351; B-285351.2, August 17, 2000, 2000 CPD P178, the agency's proposal evaluation and resulting competitive range determination were unreasonable because of

unsupported and undisclosed source selection plan standards, which led to an irrational evaluation. The agency, by identifying the SSA and SSEB at the start of acquisition planning, to include the source selection plan, could have incorporated these evaluation committees in the solicitation process. As a result, the evaluators would have been well versed regarding the solicitation, thus conducting the source selection based on the criteria stated the solicitations and selection plan standards.

### **C. AGENCY JUSTIFICATIONS AND CONTINUED PERFORMANCE**

GAO data shows a historically consistent trend in supporting HCA decisions regarding the override of required stays in continued performance resulting from a post-award bid protest (12.87 percent of the 637 protests filed in the previous seven fiscal years). (See Figures 2, 5, and 7) These metrics suggest that HCA override actions are warranted.

Data gathered from the independent research, however, suggests that the GAO does not support a majority of HCA decisions in overriding automatic stays of performance, as there are significantly lower instances in which agreement occurs (53.97 percent of the 63 protests filed in the previous seven fiscal years). (See Figures 6 and 8) An analysis of these overrides, whether executed due to the best interests of the Government, an urgent and compelling nature, or both, produced similar results. It appears that protests based on administrative and procedural issues, as opposed to those concerning the source selection and evaluation process, had very high sustainment rates (65.38 percent of the 26 protests filed in the previous seven fiscal years). (See Figures 6 and 8) This suggests that the majority of HCA override actions are not warranted, with major disagreements in GAO and HCA reasoning on those protests filed under an administrative and procedural nature. Protests filed as a result of protester disapproval regarding agency source selection and evaluation functions had a lower sustain rate (32.43 percent of the 37 protests filed in the previous seven fiscal years). (See Figures 6 and 8) This suggests that there may be discrepancies in agency interpretation and adherence to acquisition administrative and procedural requirements, but not so much from major flaws in the Federal source selection and evaluation process.

The following discussion addresses those sustained decisions, where performance was continued due to agency determination of best interest of the Government, in which



the GAO and HCA were in disagreement as a result of administrative and procedural issues. In reviewing these decisions, this researcher includes analysis and recommendations to offer areas of consideration, with respect to *administrative and procedural actions*, to prevent future conflicting opinions from occurring.

In the case of Rockwell Electronic Commerce Corporation, B-286201.6, August 20, 2001, 2001 CPD P162, under a previously sustained GAO protest, the agency's corrective action in reopening discussions and requesting proposal revisions from only one offeror in the competitive range did not resolve the improprieties that were the basis for the prior decision. The agency, utilizing the appropriate referral resources, could have properly corrected previous infractions. Assuming access to sound counsel and competition advocacy was readily available, the agency could have complied with GAO procedural recommendations as well as the requirement to seek full and open competition in accordance with statute.

In the matter of Bosco Contracting, Inc., B-270366, March 4, 1996, 96-1 CPD P140, the GAO found no supporting evidence as to why the agency failed to solicit an incumbent contractor, based on alleged poor past performance, to perform an interim services contract prior to contractor turn-over. Assuming the agency sincerely felt the incumbent contractor had poor past performance, it failed to maintain supporting documentation to substantiate the claim. The incorporation of sound legal analysis while performing attentive contract administration could have allowed the agency to validate its allegations.

In the decisions regarding International Data Systems, Inc., B-277385, October 8, 1997, 97-2 CPD 96, Global Industries, Inc., B-270592.2; B-270592.3; B-270592.4; B-270592.5, March 29, 1996, 96-2 CPD P85, Ogden Support Services, Inc., B-270354, February 28, 1996, 96-1 CPD P175, SWR Inc., B-286161.2, January 24, 2001, 2001 CPD P32, and Dynalantic Corporation, B-274944.2, February 25, 1997, 1997 U.S. Comp. Gen. LEXIS 126, the GAO found that the agencies failed to conduct meaningful discussions, failed to advise and identify protestors of revised requirement amendments and concerns with compliance parameters, deficiencies, and weaknesses, and failed to provide all offerors an opportunity to submit amended proposals deemed correctable, based on actual

requirements. By identifying and clarifying all aspects associated with the respective requirements, including requirement modifications, the agencies could have allowed potential offerors the opportunity to submit accurate and realistic proposals based on actual needs as well as provided a level competitive playing field.

In the case of The Arora Group, Inc., B-288127, June 3, 1996, 96-1 CPD P272, the GAO found that the agency placed latently ambiguous terms in the solicitation, resulting in unequal competition. It was also determined that offerors prepared proposals based on different, yet reasonable, assumptions. The agency could have provided more specific terms contained in the solicitation to alleviate ambiguity as well as identified any key performance parameters essential in fulfilling the requirement.

In the matters regarding Sprint Communications Company, B-278407.2, February 13, 1998, 1998 U.S. Comp. Gen. LEXIS 53, and MCI Telecommunications Corporation, B-276659.2, September 29, 1997, 97-2 CPD P90, the respective contracting agencies modified existing communication transmission contracts to a point beyond the scope of the original contracts, thus violating the requirement to procure services in accordance with the statutory requirements for competition. The agencies, with assistance from legal counsel, should have more closely evaluated modifications to existing requirements, which could have led to a more accurate determination as to whether a change in scope was prevalent.

The following discussion addresses those sustained decisions, where performance was continued due to *agency determination of best interest of the Government*, in which the GAO and HCA were in disagreement as a result of the source selection and evaluation process. In reviewing these decisions, this researcher includes analysis and recommendations to offer areas of consideration, with respect to source selection and evaluation, to prevent future conflicting opinions from occurring.

In the cases of Future-Tec Management Systems, Inc.; Computer & Hi-Tech Management, Inc., B-283793.5; B-283793.6, March 20, 2000, 2000 CPD P59, JW Associates, Inc., B-275209; B-275209.3, July 22, 1997, 97-2 CPD P27, and Teltara, Inc., B-280922, December 4, 1998, 98-2 CPD P124, agency evaluations and source selection determinations were found to be unreasonable because the evaluation records contained

minimal or no meaningful information with regards to differences in proposals. Therefore, they were unable to justify or support the overall assessments and selection decisions. During the development of the source selection plan, these agencies should have incorporated procedures to address documentation of proposal strengths and weaknesses, as well as the evaluation criteria contained in the solicitation, to serve as an audit trail for justifying findings and supporting the respective decisions.

In the matter of For Your Information, Inc., B-278352, December 15, 1997, 1997 U.S. Comp. Gen. LEXIS 420, the GAO found that the agency made an improper selection, based on the personnel qualification requirements contained in the solicitation, of a proposal that did not satisfy the stated personnel qualification requirements. The agency, by identifying the SSA and SSEB at the start of acquisition planning, to include the source selection plan, could have incorporated these evaluation committees in the solicitation process. As a result, the evaluators would have been thoroughly familiar with the solicitation, thus conducting the source selection based on the criteria stated the solicitations and selection plan standards.

In the decision of Technical Support Services, Inc., B-279665; B-279665.2, July 8, 1998, 1998 U.S. Comp. Gen. LEXIS 263, the agency disregarded the solicitation's stated best value evaluation scheme and awarded the contract to the offeror of the lowest-priced, technically acceptable proposal without weighing the awardee's low price against the benefits potentially associated with the protester's higher-rated proposal. Once again, by identifying the SSA and SSEB at the start of acquisition planning, to include the source selection plan, the agency could have incorporated these selection teams in the solicitation process, allowing the evaluators to fully understand the best value approach and focus on the criteria stated in the solicitations and selection plan standards.

In the case of ManTech Environmental Technology, Inc., B-271002; B-271002.2; B-271002.3, June 3, 1996, 96-1 CPD 175, the agency failed to properly consider cost evaluation factors. It was found that either a verification of the awardee's proposed new hire rates or a rate adjustment reflective of the most probable costs should have been performed. The agency, by conducting thorough market research, cost estimation, cost realism analysis, and exchanges, could have captured a more accurate and realistic figure

to use for determining the most probable cost for the new hire rates, thus assisting the SSA and SSEB in making a selection based on the most accurate information available.

The following discussion addresses those sustained decisions, where performance was continued due to agency determination that the requirement was of an *urgent and compelling nature*, in which the GAO and HCA were in disagreement as a result of *administrative and procedural issues*. In reviewing these decisions, this researcher includes analysis and recommendations to offer areas of consideration, with respect to administrative and procedural actions, to prevent future conflicting opinions from occurring.

In the cases of Mechanical Contractors, S.A., B-277916.2, March 4, 1998, 1998 U.S. Comp. Gen. LEXIS 57, and Lockheed Martin Systems Integration-Owego, B-287190.2; B-287190.3; B-287190.5, March 20, 2002, 2002 CPD P49, the GAO found that the agencies failed to conduct meaningful discussions, failed to advise and identify protestors of deficiencies, and failed to either provide all offerors a clear understanding of requirements or the opportunity to demonstrate the ability to meet the requirements. By identifying and clarifying all aspects associated with respective requirements, the agencies could have allowed potential offerors the opportunity to submit accurate and realistic proposals based on actual needs. As a result, the agency would have provided a level playing field in accordance with the requirement for full and open competition.

In the matter of Tri-State Government Services, Inc., B-277315.2, October 15, 1997, 1997 U.S. Comp. Gen. LEXIS 392, the agency's improper award to the awardee, whose proposal split line item quantities with varying prices, resulted in an unfair pricing advantage over offerors using the required single unit price schedule stated in the solicitation. Furthermore, the agency improperly conducted discussions with the awardee, after the submission of best and final offers, to allow the awardee to explain and provide prices for required quantities beyond the estimated quantities set forth in the solicitation. Because the proposal was not in compliance with the requirements stated in the solicitation, the agency, upon receipt of the proposal, should have deemed the awardee as being non-responsive. Furthermore, by conducting discussions after the submission of best and final offers, the agency's actions allowed for the awardee to have

an unfair competitive advantage. The agency, in hindsight, should have either ceased any exchanges or clarifications after receiving best and final offers, or allowed all offerors an opportunity to participate in discussions.

In the case of Adams Industrial Services, Inc., B-280186, August 28, 1998, 1998 U.S. Comp. Gen. LEXIS 289, under a small business set-aside procurement, the contracting activity failed to terminate performance by the contractor, without legitimate reason, after the Small Business Administration determined the contractor to be other than a small business. The agency could have been more aware of procedures regarding small business procurement had it referred to legal counsel, remained abreast of the status of small business through resources such as the Small Business Administration, and conducted thorough market research.

In the decision regarding Commercial Drapery Contractors, Inc., B-271222; B-271222.2, June 27, 1996, 96-1 CPD P280, the agency issued purchase orders to a Multiple Award Schedule Federal Supply Schedule (FSS) vendor at higher prices than those offered by other FSS vendors deemed capable of satisfying the agency's requirements. Although the agency claimed that the urgent delivery could only be fulfilled by the awardee, it was determined that its previous issuance of purchase orders to the awardee and subsequent cancellation of those orders was the cause for delay. The delay was caused by the agency, because of a failure to manage internal procurement actions (order-cancel), suggesting that advanced planning would have allowed the agency to properly identify needs and prevent the urgent requirement from occurring. As a result, a properly managed competitive selection, with consideration to lower priced FSS vendors, could have been performed.

In the case of Boines Construction & Equipment Co., Inc., B-279575, June 29, 1998, 1998 U.S. Comp. Gen. LEXIS 235, the agency improperly interpreted bid procedures by accepting the awardee's bid after bid opening because the bidder failed to properly mark the commercial carrier-provided envelope as required by Federal Acquisition Regulation clause 52.214-5 when using a commercial carrier to deliver a bid. In the matter of Grunley Construction Co., Inc., B-266344, February 16, 1996, 96-1 CPD P100, the agency improperly permitted correction of an alleged mistake in bid where the

bidder claimed there was a mistake in line item price rather than in total price, yet it was not clear which price could have been reasonably intended. In these situations, the agencies should have thoroughly referenced appropriate regulations and conferred with legal counsel in order to comply with proper bid procedures.

In the matter of SWR Inc., B-286161.2, January 24, 2001, 2001 CPD P32, the GAO found that the agency failed to conduct meaningful discussions to establish the required experience necessary for contract performance. By identifying and clarifying all aspects associated with the respective requirement, including experience, the agency could have allowed potential offerors the opportunity to clarify ambiguities in proposals.

The following discussion addresses those sustained decisions, where performance was continued due to agency determination that the requirement was of an *urgent and compelling nature*, in which the GAO and HCA were in disagreement as a result of the *source selection and evaluation process*. In reviewing these decisions, this researcher includes analysis and recommendations to offer areas of consideration, with respect to source selection and evaluation, to prevent future conflicting opinions from occurring.

In the case of A&D Fire Protection Inc., B-288852.2, May 2, 2002, 2002 CPD P74, the agency's selection of the higher-priced awardee based upon a cost/technical tradeoff was unsupported because the awardee offered, but had not promised, an accelerated performance schedule, which outweighed the protester's price advantage. In the decision regarding ENCORP International, Inc., B-258829, the agency did not have a reasonable basis to reject a very low-priced, technically acceptable offer because of an assumed, and unsupported, lack of offeror understanding. In the matter of OK's Cascade Company; Noonan Food Service; Western Catering, Inc.; Banks Firefighters Catering, B-257547, B-257547.2, B-257547.3, B-257547.4, October 18, 1994, 94-2 CPD P154, the agency was found to be unreasonable in conducting price/technical tradeoff analysis, as it failed to account for a quantity discount associated with a technically superior proposal. In these cases, the agency could have requested clarifications to gain a more precise understanding of all merits associated with the respective proposals. In doing so, a more accurate assessment of each proposal could have provided for a better comparison among the competitive offerors.

In the cases of Myers Investigative and Security Services, Inc., B-287949.2, July 27, 2001, 2001 CPD P129, and Johnson Controls World Services, Inc., B-289942; B-289942.2, May 24, 2002, 2002 CPD P88, the agencies could not provide sufficient documentation to support a reasonable selection. During the development of the source selection plan, these agencies should have incorporated procedures to address documentation of proposal strengths and weaknesses, as well as clear evaluation criteria, as part of an audit trail to justify findings and support the respective decisions.

In the decision regarding Safeguard Maintenance Corporation, B-260983.3, October 13, 1995, 96-2 CPD P116, the procuring agency improperly excluded the protestor from the competitive range because it misevaluated the proposal in three significant respects. The record indicates, under a proper evaluation, the proposal may have received a higher technical score than at least one higher-priced competitive range proposal. Had the agency identified the SSA and SSEB at the start of acquisition planning, to include the source selection plan, the agency could have ensured that the evaluators fully understood the evaluation criteria, including the technical aspects, in conducting a comprehensive evaluation.

#### **D. CHAPTER SUMMARY**

Reviewing both GAO and independent research data, with respect to HCA overrides, the majority of protests filed with the GAO are denied. In the case of pre-award protests, HCA decisions to override the stay of award appear to be justified, as both GAO and researcher metrics indicate. As for post-award protests, the metrics provide grounds for several notable points. Protests involving agency overrides due to the *best interest of the Government* had a higher sustain rate, according to all metrics, than those involving overrides due to *urgent and compelling reasons*. This suggests that HCA determinations as to what situation merits urgent and compelling determinations are sound, and that the GAO does not heavily contest this determination. Furthermore, the independent research indicates that sustainment rates were higher in cases where *administrative and procedural issues* were in dispute, suggesting that agency “rulebook” interpretation is an issue for review. The majority of protests involving source *selection and evaluation factors*, according to all metrics, were denied, indicating that the process is working as designed.

It is apparent to this researcher, from the independent analysis, that the GAO provides sound judgment and appropriate recommendations to serve as a foundation for lessons learned in the Federal acquisition process. A brief case analysis of denied protests led this researcher to conclude that the GAO supported the HCA position based on the merits of proper decision-making, accurate interpretation of regulations, genuine efforts to fulfill requirements, and consideration for the best interests of the Government. The case analysis of GAO sustained protests provides indications as to the level of HCA procedural compliance and source selection performance, as well as to the level of agency justification for overriding the stay of contract award and performance. When the GAO and HCA do not agree, there appears to be a trend for the agency to misunderstand acquisition statutory regulations on procedural requirements. As for the source selection and evaluation process, the analysis suggests that the sustained protests occur because the agency occasionally fails to convey documentation and clarification requirements to the evaluation members.

Combining both data interpretation (metrics) and case reviews, this researcher determines that, in general, the HCA is justified in exercising override authority, is compliant with Federal acquisition regulations and statutes, and conducts source selections and evaluations as designed. This analysis will be used to form conclusions, offer recommendations, answer research questions, and suggest areas for further study in the following chapter.



## **V. CONCLUSIONS AND RECOMMENDATIONS**

### **A. CONCLUSIONS**

After reviewing and analyzing both the Comptroller General's Suspension of Award/Performance Data letters and independent research data on decisions involving HCA overrides of statutory stays in contract award and continued performance over the previous seven fiscal years, this researcher has reached the general conclusion that the Government Accounting Office (GAO) does support respective procurement activity decisions to continue with award or performance despite protest filings and that agency justification for exercising overrides of the award stay is sound. Additionally, it appears that procurement agency justifications for continued performance resulting from Government urgency of need and best interest are valid. Furthermore, this researcher finds that Federal contracting agency decisions are justified because the source selection process being is performing as designed.

### **B. RECOMMENDATIONS**

#### **1. HCA Attention to Procedures**

Although the majority of GAO protests are denied, a significant number of those sustained involve discrepancies in the agency's compliance with regulatory and statutory acquisition procedures. An aggressive and continuous acquisition training program within respective agencies that focuses on procedural and administrative matters, including case lessons learned as a result of improper actions, may assist to promote and ensure compliance exists throughout the procurement process.

#### **2. HCA Utilization of Available Resources**

Many of the sustained protests appear to reflect a misunderstanding or misinterpretation of acquisition rules and regulation. By seeking sound legal counsel, referring to external organizations such as DCMA, DCAA, and the SBA, and requesting assistance such as exchanging information among other agencies, contracting activities can make more informed decisions which reduce the potential for procurement errors.

#### **3. HCA Foster Better Communication Among the Vendor Base**

Agency lack of awareness regarding the current and accurate status of capabilities available among potential offerors prevents the solicitation of full and open competition

as well as the evaluation team's ability to properly determine the best sources for contract award.

#### **4. HCA Continue to Exercise Overrides**

It appears, for the most part, that agencies are making sound decisions to override stays of contract award and performance when necessary. In reviewing GAO protest decisions, however, it is apparent that there needs to be an emphasis in justifying an override due to best interests of the Government because of the outcomes associated with sustained protests. Improper best interest justification results in protestor reimbursements and leads to the agency's requirement to re-compete for award, which creates delays in cost, schedule, and performance.

#### **5. HCA Conduct Thorough Market Research**

A fair number of the sustained decisions that were reviewed indicate a lack of comprehensive market research on the part of the procuring activity. Continuous effort in seeking market information and conducting market analysis can provide contracting activities with procedural and source selection tools needed to carry out a successful acquisition plan.

#### **6. HCA Foster Better Communication Among Industry Based Organizations and Resources**

Agency lack of awareness regarding the current and accurate status of capabilities available among potential offerors prevents the solicitation of full and open competition as well as the evaluation team's ability to properly determine the best sources for contract award.

#### **7. HCA Incorporate All Team Players in Acquisition Plan**

Numerous cases sustained by the GAO reflected internal source selection inconsistencies within the agency, such as evaluating factors for selection that were not contained in the solicitation. By including all the members involved in the procurement, such as SSA, SSEB, and representatives of industry, the acquisition team can develop integrated product teams that fully understand all criteria and considerations associated with the buy. As a result, respective procurement misunderstandings and ambiguities can be minimized.

## **8. HCA Properly Document and Maintain All Actions Associated with the Contract File**

Missing or unsupported documentation regarding contract actions resulted in several sustained decisions. A detailed and accurate record of all the developments within a procurement can provide the agency with an audit trail to justify its decision making process.

### **C. ANSWERS TO RESEARCH QUESTIONS**

#### **1. Primary Research Question**

- Why are there indications that GAO generally supports HCA (both DoD and Civilian) in overriding suspension of award and continued performance despite bid protests?

Occasionally, situations warrant the HCA to override statutory stays of contract award or continued performance. The interpretation of the GAO data and analysis of independent case research contained in the study lead to the conclusion that the majority of the HCA overrides are justified. The most notable HCA override miscues involve agency noncompliance with acquisition administrative and procedural requirements and functions, with little evidence to suggest significant discrepancies in the source selection process. Therefore, indications that GAO generally supports HCA in overriding suspension of award and continued performance despite bid protests reflects this researcher's conclusion that Federal contracting agencies are, for the most part, in compliance with Federal procurement regulations and statutes. In reviewing protest sustainments and denials, this researcher's overall determination of HCA performance and conduct in promoting full and open competition, supporting socioeconomic goals, and evaluating proposals based on solicitation criteria is meeting the intent of acquisition regulations and statute.

#### **2. Secondary Questions**

##### ***a. What is the Intended Purpose of Federal Government Source Selection Criteria?***

After analyzing the independent cases, it is clear that source selection criteria serves to provide both agency and offeror with a clear understanding of the requirement. It is necessary to determine and convey the key areas of importance for contract performance. Developing specific standards and requirements which address areas such as cost, quality, technical ability, socioeconomic interests, and mandates,

provides both the agency and potential offerors with a benchmark to establish a competitive range and perform a meaningful comparison of proposals. These design and performance parameters also ensure that the minimum requirements are met, whether under a lowest price technically acceptable or trade-off evaluation, with respect to cost, schedule, and performance in capturing the best value based on the acquisition approach. The independent analysis shows that in cases where evaluation factors did not mimic the evaluation criteria contained in the solicitations, an improper selection resulted.

***b. What is the Intended Purpose of the Federal Government Source Selection Process?***

After conducting the independent case review, this researcher concludes that the source selection process is designed to promote a fair and unbiased playing field for offerors to compete while providing Federal agencies with a tool to execute acquisition strategies suitable for the specific circumstances of the acquisition.

***c. Is the Federal Government Source Selection Process Working as Intended?***

To summarize the research findings, the Federal Government source selection process is performing as designed. As is the case in all processes, the source selection process has areas needing improvement, however, the overall methods and procedures are functioning effectively in meeting its purpose. This researcher attributes most of the Federal Government source selection shortcomings to the wording found in statutory regulation, its misinterpretation by acquisition professionals, or both.

***d. What Constitutes a Federal Contracting Agency Determination, As a Result of a Bid Protest, That Urgency Justifies Continued Performance?***

The review and analysis of the independent cases led this researcher to the conclusion that the customer need for a product or service resulting from unexpected contingencies and circumstances constitutes urgency and justifies continued performance. Situations in which procurement actions are necessary to support unplanned customer emergencies, vice a lack of advance planning on behalf of the contracting activity or customer, are justified in citing urgent and compelling reasons in the procurement action. In the cases where the agency deemed the acquisition to be urgent and compelling, GAO did not contest the majority of the supporting justifications.

*e. What Constitutes a Federal Contracting Agency Determination, As a Result of a Bid Protest, That Performance is in the Government's Best Interest?*

The research leads to the conclusion that in most of the cases where the HCA overrode the stay of award or continued performance because of the Government's best interest, agency justification was based on avoiding additional costs and delays in schedule and performance associated with a stay. There were instances in which the procurement activity cited best interest to support alternative sources of supply within the vendor base.

**D. SUGGESTED AREAS FOR FURTHER RESEARCH**

- Locate and analyze the actual cases which serve as data for the Comptroller General's Suspension of Award/Performance Data reports
- Conduct a detailed analysis regarding the 48 GAO protest denials found via the independent research
- Conduct an analysis on GAO protests involving HCA compliance with small business requirements
- Conduct analysis on GAO protests involving HCA discussions and full and open competition
- Conduct analysis on GAO recommendations not followed by HCA, including agency reconsiderations
- Conduct an analysis on decisions regarding HCA override justification in other courts, such as the U.S. Court of Federal Claims; or U.S. district courts

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## **APPENDIX A. POLICY ON AGENCY PROCUREMENT PROTESTS IS ESTABLISHED BY EXECUTIVE ORDER 12979**

Ex. Ord. No. 12979, Oct 25, 1995, 60 F.R. 55171, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts, it is hereby ordered as follows:

**Sec. 1.** Heads of executive departments and agencies ("agencies") engaged in the procurement of supplies and services shall prescribe administrative procedures for the resolution of protests to the award of their procurement contracts as an alternative to protests in fora outside the procuring agencies. Procedures prescribed pursuant to this order shall:

(a) emphasize that whenever conduct of a procurement is contested, all parties should use their best efforts to resolve the matter with agency contracting officers;

(b) to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel;

(c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review, at a level above the contracting officer, of any decision by a contracting officer that is alleged to have violated a statute or regulation and, thereby, caused prejudice to the protester; and

(d) except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States, prohibit award or performance of the contract while a timely filed protest is pending before the agency. To allow for the withholding of a contract award or performance, the agency must have received notice of the protest within either 10 calendar days after the contract award or 5 calendar days after the bidder or offeror who is protesting the contract award was given the opportunity to be debriefed by the agency, whichever date is later.

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## **APPENDIX B. OVERRIDE REQUEST WITH A SUPPORTING DETERMINATION AND FINDING (D&F) JUSTIFICATION**

### **Example of Override Request**

#### **Appendix 1 -- Example Override Analysis**

##### **Basis For Override Decision**

Upon the basis of the following findings, I [contracting officer], have determined that contract [contract no] for operation and maintenance in support of [organization] for the US Military Training mission in [location] should be authorized to proceed in the face of a General Accounting Office (GAO) protest [protest docket no.] filed by the incumbent contractor [name of contractor].

I find that the contract performance by [contractor x] will be in the best interest of the United States and that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision on the protest. The U.S. Army's basis for the override decision is presented in enclosure 1. As discussed in encl. 1, the impact to performance and costs on critical programs will be severe if performance by [contractor x] is not permitted.

The potential damage to the government if performance by [contractor x] is not permitted has been analyzed and is considered to be of significantly less risk to the [army organization] than would be realized upon extension of the incumbent's contract. The extension of the incumbent's contract does not allow for performance of the critical functions of the Facilities Control Officer (FAO) nor does it provide for Tower maintenance. Both of these functions have been incorporated into [contractor x's] contract.

In the event that the protest is sustained, we would move to continue the contract with [contractor x] while another round of BAFO's is considered. This would allow the Army to maintain the critical FCO and tower maintenance functions. Since [contractor x's] price is half that of the incumbent's actual costs to the Army during any such extension with [contractor x] would be less than the cost of an extension of the incumbent's contract (which would be necessary if this override is not approved.)

Our evaluation team is in place and minimal time will be required for them to reacquaint themselves with the details of the solicitation if it becomes necessary to evaluate another round of BAFO's government labor cost, therefore, would be approximately the same regardless of whether the override is approved or not.

I find that the issues of the protest are without merit and unlikely to be upheld by the GAO. The issues of the protest are discussed in encl. 2.

## Basis For Override Decision

1. **Purpose:** To provide the basis for and to request override of the stay of performance imposed by protest against an award of a contract issued by [command] for the [command, unit, location].
2. **Background:** this requirement is for operation and maintenance of components of the [unit/area/etc] as follows: the facilities control office, technical control facilities, patch and test facility, outside cable plant, and the communications tower and associated antennas.

The FCO provides management and control of all communication facilities for the [unit]. The FCO is required to be manned and operated 24 hours a day.

There are 2 TCDs located in [area] and one patch and test facility located in [area] that makes up the backbone of the [area] defense information infrastructure. Together the TCFs and PTF are the conduit for the command, control and communications, computers (C4I) for the [area] of operations.

The microwave antenna tower and associated antennas are located in [area]. Routine maintenance is performed every four months and include inspection, painting, removal of rust, tightening of bolts, alignment of antenna, etc. [Location] is on the gulf and thus highly susceptible to corrosion, rust, high winds, and dust storms. Failure of any of these systems can cause extreme communications degradation or failure.

3. **Contractual and Protest Background.** Contract [no.] is broader in scope than the existing one held by the incumbent, who is the protestor, and incorporates three separate contracts into a single contract. The scope was expanded to include the FCO function which is being unofficially performed by the incumbent and is not currently covered by the incumbent's contract. The request for proposals was issued [date] and evaluation criteria stated evaluations would be based on an integrated assessment of technical, past performance, and price realism in order to determine the offeror whose proposal offered the best value to the government.

The award of the contract was made to [contractor x] for a price of [amount] on [date.] The incumbent received a debriefing at [location] on [date.] and later protested to the GAO on [date], therefore, this is considered a timely protest.

4. **Protest Issues:** Contractor alleges: The Army failed to properly evaluate its and the new contractor's technical proposals. The Army failed to conduct a reasonable price realism analysis of the new contractors proposed estimated price. The Army improperly evaluated its past performance. The Army's cost/technical trade off is not consistent with the evaluation criteria.

Essentially, the protestor believes that because they are the incumbent they should have received a higher overall score and the new contractor a lower score. Because the incumbent's (protestor) price is \$9.3 Million higher than the new contractor, the incumbent believes that the new contractor's proposal is unreasonable. Incumbent claims knowledge of poor performance by the new contractor and believes the technical/price trade off decision is not in accordance with the solicitation.

After evaluation of proposals, it was determined that the incumbent had a minor technical advantage over the new contractor; however, the new contractor offered a price savings of \$9.3 Million. See SSEB recommendation. The source selection authority made a price/trade off decision that stated the minor technical advantage was not worth the \$9.3 million premium. We believe that the protest is wholly without merit; no allegations are supported by facts.

5. ***Effect of the Stay:*** The [unit/agency] is dependent upon its service contractor to accomplish its mission. Overriding the stay of performance would result in the following:

a. ***Mission accomplishment.*** Even though the incumbent is performing the FCO mission it is not in the contract. They have emphatically stated that they will not continue providing FCO functions after 1 Oct the [unit] can perform this function but only for a limited time as personnel assets are required elsewhere. This function is contained in the new contractor's contract and they are prepared to assume this responsibility immediately.

b. ***Significant price savings.*** Phase in/out is scheduled in Oct-Nov. The new contractor did not propose any costs for this phase-in period. The new contractor is prepared to begin immediately the incumbent's costs will decline during phase-out as a result of their personnel being phased out of the project. Therefore, costs during phase out will be less than if the incumbent continued full performance during that same period. For any given time after completion of phase-in/out, until the protest is denied, the government will realize a 50% savings in cost over that which would be paid to the incumbent. If the incumbent continues to perform until the protest is decided, the government will pay a 50% premium for each month of continued performance.

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## **APPENDIX C. JUSTIFICATION AS TO WHY THE AGENCY FOUND THE AWARD TO BE IN THE BEST INTEREST OF THE GOVERNMENT**

### **Urgent and Compelling Circumstances**

#### **D& F Must Address:**

- ◆ Why override is urgent and compelling
  - ◆ criticality of item/service
  - ◆ necessity of continued Performance
- ◆ Why "particular" contractor is Essential
  - ◆ special/technical skills
  - ◆ cost considerations/savings
  - ◆ scope/nature of work/item
  - ◆ other special considerations
- ◆ Why extending incumbent is **Not** in U.S.'s best interests
- ◆ Harm government will incur w/o Override
  - ◆ why can't agency wait for a decision on the merits of the protest
- ◆ Likelihood of protestor prevailing

### **Best Interests of the United States**

#### **D& F Must Consider:**

#### **Best Interests**

- ◆ Why is continued performance in the best interests of the U.S.
  - ◆ Urgent and compelling circumstances
  - ◆ Other reasons
- ◆ Why "particular" contractor is essential. How/why U.S. interests would be harmed if the proposed contractor were not allowed to continue performance

- ◆ special/technical skills
  - ◆ cost considerations/savings
  - ◆ scope/nature of work/item
  - ◆ other special considerations
- 
- ◆ Why extending incumbent is ***Not*** in U.S.'s best interests
  - ◆ Harm government will incur w/o override
    - ◆ why can't agency wait for a decision on the merits of the protest
    - ◆ why U.S. interests would be harmed
  - ◆ Likelihood of protestor prevailing

## **APPENDIX D. SUSPENSION OF AWARD AND PERFORMANCE DATA WITH RESPECT TO OVERRIDES**

Comptroller General of the United States letter B-158766, Subject: Suspension of Award/Performance Data, January 29, 1997.

Comptroller General of the United States letter B-158766, Subject: Suspension of Award/Performance Data, January 30, 1998.

Comptroller General of the United States letter B-158766, Subject: Suspension of Award/Performance Data, January 29, 1999.

Comptroller General of the United States letter B-158766, Subject: Suspension of Award/Performance Data, January 18, 2000.

Comptroller General of the United States letter B-158766, Subject: Suspension of Award/Performance Data, January 31, 1996.

United States General Accounting Office letter B-158766, Subject: Suspension of Award/Performance Data, December 21, 2000.

United States General Accounting Office letter B-158766, Subject: Suspension of Award/Performance Data, December 21, 2000.

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## **APPENDIX E. PROTESTS FILED BEFORE AWARD – CONTRACT AWARDED**

ABC Healthcare, B-266043, January 23, 1996, 1996 U. S. Comp. Gen. LEXIS 32.

Aeronautical Instrument & Radio Company, Inc., B-281635, February 24, 1999, 99-1 CPD P47.

Akal Security, Inc., B-271385; B-271385.3, July 10, 1996, 96-2 CPD P77.

American Management Systems, Inc., B-285645, September 8, 2000, 2000 CPD P163.

Crowley American Transport, Inc., B-259599.2, June 19, 1995, 95-1 CPD P277.

CSR, Inc., B-260955, August 7, 1995, 95-2 CPD P59.

General Distributors, Inc., B-257812, November 14, 1994, 94-2 CPD P184.

Jensco Marine, Inc., B-278929.7, February 11, 1999, 99-1 CPD P32.

Navajo Nation Oil & Gas Company, B-261329, September 14, 1995, 95-2 CPD P133.

Navajo Nation Oil & Gas Company, B-270723, April 15, 1996, 96-1 CPD P187.

Northwest Procurement Institute, Inc., B-286345, November 17, 2000, 2000 CPD P192.

Olympus Building Services, Inc., B-285351; B-285351.2, August 17, 2000, 2000 CPD P178.

P. L. 98-369, div. B, title VII, §2721, 98 Stat. 1175, 1185, 1186 (1984) (amending 10 USC §2301(b)(6)), July 18, 1984.

RAMCOR Services Group, Inc., B-276633.2; B-276633.3; B-276633.4, March 23, 1998, 1998 U. S. Comp. Gen. LEXIS 186.

Resource Applications, Inc., B-271079.6, August 12, 1996, 96-2 CPD P61.

S. C. Myers & Associates, Inc., B-286297, December 20, 2000, 2000 CPD P16.

SEMCOR Inc.; HJ Ford Associates, Inc., B-279794; B-279794.2; B-279794.3, July 23, 1998, 1998 U. S. Comp. Gen. LEXIS 281.

Techno-Sciences, Inc., B-257686; B-257686.2, October 31, 1994, 94-2 CPD P164.

Telos Field Engineering, B-253492.6, December 15, 1994, 94-2 CPD P240.

Todd Pacific Shipyards Corporation, B-281383, February 1, 1999, 99-1 CPD P28.

W.M. Schlosser Company, Inc., B-258284, December 12, 1994, 94-2 CPD P234.

**APPENDIX F. PROTESTS FILED AFTER AWARD-  
PERFORMANCE CONTINUED DUE TO BEST INTERESTS OF  
THE GOVERNMENT**

Air Sal Leasing, Inc., B-265938, January 16, 1996, 96-1 CPD P83.

Bosco Contracting, Inc., B-270366, March 4, 1996, 96-1 CPD P140.

Carlson Wagonlit Travel, B-287016, March 6, 2001, 2001 CPD P49.

Department of the Navy-Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD P16.

DGS Contract Services, Inc.; Inventory Accounting Services, Inc., B-258429; B-258429.2, January 19, 1995, 95-1 CPD P27.

Dynalitic Corporation, B-274944.2, February 25, 1997, 1997 U. S. Comp. Gen. LEXIS 126.

EDAW, Inc., B-272884, November 1, 1996, 96-2 CPD P213.

For Your Information, Inc., B-278352, December 15, 1997, 1997 U. S. Comp. Gen. LEXIS 420.

Future-Tec Management Systems, Inc.; Computer & Hi-Tech Management, Inc., B-283793.5; B-283793.6, March 20, 2000, 2000 CPD P59.

Global Industries, Inc., B-270592.2; B-270592.3; B-270592.4; B-270592.5, March 29, 1996, 96-2 CPD P85.

International Data Systems, Inc., B-277385, October 8, 1997, 97-2 CPD P96.

J. A. Jones Management Services, Inc., B-284909.5, October 2, 2000, 2001 CPD P64.

JW Associates, Inc., B-275209; B-275209.3, July 22, 1997, 97-2 CPD P27.

Lloyd-Lamont Design, Inc., B-270090.3, February 13, 1996, 96-1 CPD P71.

ManTech Environmental Technology, Inc., B-271002, June 3, 1996, 96-1 CPD P175.

MCI Telecommunications Corporation, B-276659.2, September 29, 1997, 97-2 CPD P90.

Nova Group, Inc., B-282947, September 15, 1999, 99-2 CPD P56.

Ogden Support Services, Inc., B-270354, February 28, 1996, 96-1 CPD P175.

Prospect Associates, Inc., B-260696, July 7, 1995, 95-2 CPD P53.

Randolph Engineering Sunglasses, B-280270, August 10, 1998, 1998 U. S. Comp. Gen. LEXIS 274.

Reflectone Training Systems, Inc; Hernandez Engineering, Inc., B-261224; B-261224.2, August 30, 1995, 95-2 CPD P95.

RGII Technologies, Inc., B-278352.2; B-278352.3, April 14, 1998, 98-1 CPD P130.

Rockwell Electronic Commerce Corporation, B-286201.6, August 20, 2001, 2001 CPD P162.

Sprint Communications Company, B-278407.2, February 13, 1998, 1998 U. S. Comp. Gen. LEXIS 53.

SWR, Inc., B-286161.2, January 24, 2001, 2001 CPD P32.

TAAS Israel Industries, Ltd., B-260733; B-260733.2; B-260733.3, July 17, 1995, 95-2 CPD P23.

Technical Support Services, Inc., B-279665; B-279665.2, July 8, 1998, 1998 U. S. Comp. Gen. LEXIS 263.

The Arora Group, Inc., B-288127, June 3, 1996, 96-1 CPD P272.

The Futures Group, International, B-270397.2, May 16, 1996, 97-1 CPD P140.

Teltara, Inc., B-280922, December 4, 1998, 98-2 CPD P124.

## **APPENDIX G. PROTESTS FILED AFTER AWARD- PERFORMANCE CONTINUED DUE TO URGENT AND COMPELLING NATURE**

Adams Industrial Services, Inc., B-280186, August 28, 1998, 1998 U. S. Comp. Gen. LEXIS 289.

All Points International, Inc., B-260134, May 22, 1995, 95-1 CPD P252.

A&D Fire Protection, Inc., B-288852.2, May 2, 2002, 2002 CPD P74.

Boines Construction & Equipment Co., Inc., B-279575, June 29, 1998, 1998 U. S. Comp. Gen. LEXIS 235.

Braswell Services Group, Inc., B-278921.2, June 17, 1998, 1998 U. S. Comp. Gen. LEXIS 246.

Commercial Drapery Contractors, Inc., B-271222; B-271222.2, June 27, 1996, 96-1 CPD P280.

ENCORP International, B-258829, February 21, 1995, 95-1 CPD P100.

Grunley Construction Co., Inc., B-266344, February 16, 1996, 96-1 CPD P100.

G&N, L.L.C., B-285118; B-285118.2; B-285118.3, July 19, 2000, 2002 CPD P3.

Johnson Controls World Services, Inc., B-289942; B-289942.2, May 24, 2002, 2002 CPD P88.

JRW Management Company, Inc., B-260396.2, June 16, 1995, 95-1 CPD P276.

Lockheed Martin Systems Integration-Oswego, B-287190.2; B-287190.3; B-287190.5, March 20, 2002, 2002 CPD P49.

Mechanical Contractors, S.A., B-277916.2, March 4, 1998, 1998 U. S. Comp. Gen. LEXIS 57.

Myers Investigative and Security Services, Inc., B-287949.2, July 27, 2001, 2001 CPD P129.

Nelson Hurst Insurance Brokers Limited, B-261548, September 27, 1995, 95-2 CPD P148.

Novavax, Inc., B-286167; B-286167.2, December 4, 2000, 2000 CPD P202.

Nova Group, Inc., B-282947, September 15, 1999, 99-2 CPD P56.

OK's Cascade Company; Noonan Food Service; Western Catering, Inc.; Banks Firefighters Catering, B-257547; B-257547.2; B-257547.3; B-257547.4, October 18, 1994, 94-2 CPD P154.

Packaging Strategies, Inc., B-280814, November 25, 1998, 98-2 CPD P120.

Polar Power, Inc., B-270536, March 18, 1996, 96-1 CPD P157.

Premier Nurse Staffing, Inc., B-258288.3, April 3, 1995, 95-1 CPD P174.

Resource Consultants, Inc., B-290163; B-290163.2, June 7, 2002, 2002 U. S. Comp. Gen. LEXIS 79.

R. P. Richards Construction Company, B-260543, June 21, 1995, 95-1 CPD P280.

Shel-Ken Properties, Inc.; McSwain and Associates, Inc., B-261443.3; B-261443.4, May 20, 1996, 96-1 CPD P243.

Safeguard Maintenance Corporation, B-260983.3, October 13, 1995, 96-2 CPD P116.

Southern Technologies, B-278030.3, April 29, 1998, 1998 U. S. Comp. Gen. LEXIS 189.

Sun Chemical Corporation, B-288466; B-288466.2; B-288466.3, October 17, 2001, 2001 CPD P185.

SWR, Inc., B-286161.2, January 24, 2001, 2001 CPD P32.

Tri-State Government Services, Inc., B-277315.2, October 15, 1997, 1997 U. S. Comp. Gen. LEXIS 392.

TRW, Inc., B-260968.2; B-260968.3; B-260968.4; B-260968.5, August 14, 1995, 95-2 CPD P101.

Vereinigte Gebäudereinigungsgesellschaft, B-280805, November 23, 1998, 98-2 CPD P117.

Warvel Products, Inc., B-281051.5, July 7, 1999, 99-2 CPD P13.

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American Management Systems, Inc., B-285645, September 8, 2000, 2000 CPD P163.

A&D Fire Protection, Inc., B-288852.2, May 2, 2002, 2002 CPD P74.

Boines Construction & Equipment Co., Inc., B-279575, June 29, 1998, 1998 U. S. Comp. Gen. LEXIS 235.

Bosco Contracting, Inc., B-270366, March 4, 1996, 96-1 CPD P140.

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